

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DAVID GASTON WILKES,  
Plaintiff,  
v.  
HUNTER, et al.,  
Defendants.

Case No. [16-cv-02401-JD](#)

**ORDER OF SERVICE**

Plaintiff, a former detainee, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. The original complaint was dismissed with leave to amend and plaintiff has filed an amended complaint.

**DISCUSSION**

**STANDARD OF REVIEW**

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Although a complaint “does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a

cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. The United States Supreme Court has explained the “plausible on its face” standard of *Twombly*: “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that: (1) a right secured by the Constitution or laws of the United States was violated, and (2) the alleged deprivation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

### LEGAL CLAIMS

Plaintiff alleges that San Francisco Sheriff’s Department Deputies failed to transfer him to an outside mental health treatment program. Deliberate indifference to serious medical needs violates the Eighth Amendment’s proscription against cruel and unusual punishment.<sup>1</sup> *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A determination of “deliberate indifference” involves an examination of two elements: the seriousness of the prisoner’s medical need and the nature of the defendant’s response to that need. *Id.* at 1059.

A “serious” medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the “unnecessary and wanton infliction of pain.” *Id.* The existence of

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<sup>1</sup> It is not clear if plaintiff was a pretrial detainee or a convicted prisoner. However, even though pretrial detainees’ claims arise under the Due Process Clause, the Eighth Amendment serves as a benchmark for evaluating those claims. *See Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996) (8th Amendment guarantees provide minimum standard of care for pretrial detainees). The Ninth Circuit has determined that the appropriate standard for evaluating constitutional claims brought by pretrial detainees is the same one used to evaluate convicted prisoners’ claims under the Eighth Amendment. “The requirement of conduct that amounts to ‘deliberate indifference’ provides an appropriate balance of the pretrial detainees’ right to not be punished with the deference given to prison officials to manage the prisons.” *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc) (citation omitted).

1 an injury that a reasonable doctor or patient would find important and worthy of comment or  
2 treatment; the presence of a medical condition that significantly affects an individual's daily  
3 activities; or the existence of chronic and substantial pain are examples of indications that a  
4 prisoner has a “serious” need for medical treatment. *Id.* at 1059-60.

5 A prison official is deliberately indifferent if he or she knows that a prisoner faces a  
6 substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate  
7 it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must not only “be aware of  
8 facts from which the inference could be drawn that a substantial risk of serious harm exists,” but  
9 he “must also draw the inference.” *Id.* If a prison official should have been aware of the risk, but  
10 was not, then the official has not violated the Eighth Amendment, no matter how severe the risk.  
11 *Gibson v. County of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002). “A difference of opinion  
12 between a prisoner-patient and prison medical authorities regarding treatment does not give rise to  
13 a § 1983 claim.” *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).

14 “Within the prison context, a viable claim of First Amendment retaliation entails five basic  
15 elements: (1) An assertion that a state actor took some adverse action against an inmate (2)  
16 because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s  
17 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate  
18 correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted).  
19 *Accord Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (prisoner suing prison officials under §  
20 1983 for retaliation must allege that he was retaliated against for exercising his constitutional  
21 rights and that the retaliatory action did not advance legitimate penological goals, such as  
22 preserving institutional order and discipline); *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994)  
23 (per curiam) (same).

24 Title II of the Americans with Disabilities Act (“ADA”) “prohibit[s] discrimination on the  
25 basis of disability.” *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). Title II provides  
26 that “no qualified individual with a disability shall, by reason of such disability, be excluded from  
27 participation in or be denied the benefits of the services, programs, or activities of a public entity,  
28 or be subject to discrimination by such entity.” 42 U.S.C. § 12132. Title II of the ADA applies to

1 inmates within state prisons. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 213  
2 (1998).

3 In order to state a claim that a public program or service violated Title II of the ADA, a  
4 plaintiff must show: he is a “qualified individual with a disability”; he was either excluded from  
5 participation in or denied the benefits of a public entity’s services, programs, or activities, or was  
6 otherwise discriminated against by the public entity; and such exclusion, denial of benefits, or  
7 discrimination was by reason of his disability. *McGary v. City of Portland*, 386 F.3d 1259, 1265  
8 (9th Cir. 2004).

9 Plaintiff names as defendants, Captain Polsen and Lieutenant Hunter of the San Francisco  
10 County Sheriff’s Department. He alleges violations of the Eighth Amendment, ADA and state  
11 law. Plaintiff states that he was in San Francisco County Jail when on April 12, 2016, a superior  
12 court judge granted plaintiff’s motion to be transferred to a treatment program. Plaintiff suffers  
13 from schizophrenia and substance abuse problems. He alleges that Captain Polsen refused to  
14 transfer plaintiff and it was only ninety days later that he was finally transferred but the delay  
15 caused him injuries. These allegations are sufficient to proceed against Polsen as a violation of the  
16 Eighth Amendment and state law.

17 Plaintiff’s claim under the ADA fails to state a claim. He has failed to present any  
18 plausible allegations that he was denied transfer to the treatment facility due to any disability. The  
19 treatment or lack of medical treatment for plaintiff’s condition does not provide a basis upon  
20 which to impose liability. *Burger v. Bloomberg*, 418 F.3d 882 (8th Cir. 2005) (medical treatment  
21 decisions not basis for ADA claims); *Fitzgerald v. Corr. Corp. of Am.*, 403 F.3d 1134, 1144 (10th  
22 Cir. 2005) (medical decisions not ordinarily within the scope of the ADA); *Bryant v. Madigan*, 84  
23 F.3d 246, 249 (7th Cir. 1996) (“The ADA does not create a remedy for medical malpractice.”).

24 Nor has plaintiff presented a cognizable retaliation claim. He only states that he was  
25 denied the transfer because of his complaints about the jail and because he was a whistle blower.  
26 He has failed to present any plausible allegations that he was denied transferred due to some  
27 protected conduct. His conclusory allegations do not plausibly demonstrate an entitlement to  
28 relief. *Iqbal*, 556 U.S. at 679. In addition, plaintiff fails to identify any specific allegations

1 against defendant Hunter; therefore, this defendant is dismissed from this action.

## 2 CONCLUSION

3 1. All claims and defendants are dismissed with prejudice except for the claim that  
4 defendant Polsen interfered with plaintiff's transfer in violation of the Eighth Amendment and  
5 state law. The clerk shall issue a summons and the United States Marshal shall serve, without  
6 prepayment of fees, copies of the amended complaint (Docket No. 12) with attachments and  
7 copies of this order on the following defendant: San Francisco County Sheriff's Captain Polsen at  
8 San Francisco County Jail.

9 2. In order to expedite the resolution of this case, the Court orders as follows:

10 a. No later than sixty days from the date of service, defendant shall file a  
11 motion for summary judgment or other dispositive motion. The motion shall be supported by  
12 adequate factual documentation and shall conform in all respects to Federal Rule of Civil  
13 Procedure 56, and shall include as exhibits all records and incident reports stemming from the  
14 events at issue. If defendant is of the opinion that this case cannot be resolved by summary  
15 judgment, he shall so inform the Court prior to the date his summary judgment motion is due. All  
16 papers filed with the Court shall be promptly served on the plaintiff.

17 b. At the time the dispositive motion is served, defendant shall also serve, on a  
18 separate paper, the appropriate notice or notices required by *Rand v. Rowland*, 154 F.3d 952, 953-  
19 954 (9th Cir. 1998) (en banc), and *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003).  
20 *See Woods v. Carey*, 684 F.3d 934, 940-941 (9th Cir. 2012) (*Rand* and *Wyatt* notices must be  
21 given at the time motion for summary judgment or motion to dismiss for nonexhaustion is filed,  
22 not earlier); *Rand* at 960 (separate paper requirement).

23 c. Plaintiff's opposition to the dispositive motion, if any, shall be filed with  
24 the Court and served upon defendant no later than thirty days from the date the motion was served  
25 upon him. Plaintiff must read the attached page headed "NOTICE -- WARNING," which is  
26 provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc),  
27 and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

1 If defendant files a motion for summary judgment claiming that plaintiff failed to exhaust  
2 his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff should take  
3 note of the attached page headed "NOTICE -- WARNING (EXHAUSTION)," which is provided  
4 to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003).

5 d. If defendant wishes to file a reply brief, he shall do so no later than fifteen  
6 days after the opposition is served upon him.

7 e. The motion shall be deemed submitted as of the date the reply brief is due.  
8 No hearing will be held on the motion unless the Court so orders at a later date.

9 3. All communications by plaintiff with the Court must be served on defendant, or  
10 defendant's counsel once counsel has been designated, by mailing a true copy of the document to  
11 defendants or defendants' counsel.

12 4. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.  
13 No further Court order under Federal Rule of Civil Procedure 30(a)(2) is required before the  
14 parties may conduct discovery.

15 5. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court  
16 informed of any change of address by filing a separate paper with the clerk headed "Notice of  
17 Change of Address." He also must comply with the Court's orders in a timely fashion. Failure to  
18 do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of  
19 Civil Procedure 41(b).

20 **IT IS SO ORDERED.**

21 Dated: January 17, 2017

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26 JAMES DONATO  
27 United States District Judge  
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**NOTICE -- WARNING (SUMMARY JUDGMENT)**

If defendants move for summary judgment, they are seeking to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact-- that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial.

**NOTICE -- WARNING (EXHAUSTION)**

If defendants file a motion for summary judgment for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions.

If defendants file a motion for summary judgment for failure to exhaust and it is granted, your case will be dismissed and there will be no trial.

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**CERTIFICATE OF SERVICE**


I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on January 17, 2017, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

David Gaston Wilkes  
9670 Empire Road  
Oakland, CA 94603

Dated: January 17, 2017

Susan Y. Soong  
Clerk, United States District Court

By:   
LISA R. CLARK, Deputy Clerk to the  
Honorable JAMES DONATO